

Date of decision: 18-1-1996

For Approval and Signature:

The Hon'ble Mr.Justice N.J.Pandya

The Hon'ble Mr.Justice A.R.Dave

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 or any ..  
  
thereunder?
5. Whether it is to be circulated to the Civil Judge?

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Mr.S.M.Shah, L.A. for the appellants  
Mr.P.V.Nanavati, L.A. for the respondents  
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Coram: N.J.Pandya & A.R.Dave,JJ.

January 18,1996

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ORAL JUDGMENT (Per N.J.Pandya,J.)

The learned Advocate Mr.S.M.Shah, appearing for the appellants has dealt with each and every point that has been raised in the memo of appeal against the judgment of the learned Judge of the 8th Court, City Civil Court, Ahmedabad, whereby he has dismissed Insolvency Petition No.6/79 on 28-2-1983.

2. Before the trial Court also, the matter was fought with utmost vigour and vehement and the learned Judge has set out the area of controversy under the heading of issues as framed at Exh.48. They read as under:

(1) Do the petitioners prove that the petitioner nos.1 to 3 firms are registered under the Partnership Act?

(2) Do the petitioners prove that the opponents are indebted to them in the sum of Rs.500/- or more?

(3) Do the petitioners prove that opponents no.2 & 3 have absented themselves from their dwelling houses or the usual place of the business with intent to defat or delay their creditors?

(4) Do the petitioners prove that the opponent No.2 & 3 secluded themselves so as to deprive their creditors of the means of communicating with them, with intent to defeat or delay their creditors?

(4A) Whether applicants prove that opponents informed their creditors to suspend their payments?

(5) Do the petitioners prove that the opponents entered into composition deed as alleged? If yes, what is its effect?

(6) Is the petition not tenable at law?

(7) What order?

2. The first two issues are technical and formal in nature and they have been decided in favour of the petitioners. The material issues are Issues No.3,4,4A and 5.

3. Once the aforesaid issues are referred to, it will become apparent that the allegations were to the effect that opponents 2 & 3 are not traceable at all and they are deliberately staying away from their dwelling huts and correspondingly they are hiding themselves away from the creditors. In this circumstance, subsequent issue, namely issue No.4A as to their having suspending payment, will automatically be established provided findings of issues No.3 & 4 are given in favour of the petitioners. Issue no.5 is as to composition deed but it will have to be established on its own.

4. The learned Judge has discussed the issues at length and in connection with issues 3,4 & 4A, he has held in favour of the respondent-opponents. The discussion as to issue no.3 starts from para 12 onwards and after factually dealing with the evidence as to non availability of the respondents and as to their hiding away, the learned Judge has in clear terms held that it is not the position. Naturally, therefore, the question of their having suspended the payment would not arise. This being a factual aspect gone into by the learned Judge, who had the special advantage of seeing the witnesses deposing before himself and had otherwise the benefit of recording the evidence himself as also going through the record at the first instance and form his own conclusion on the basis of the overall situation as to the veracity or otherwise of the material placed before him, in our opinion, the efforts made by L.A. Mr.S.M.Shah on behalf of the appellants will not help the appellants in any manner. The conclusion arrived at by the learned Judge with regard to these 3 issues, in our opinion, is not required to be interfered with and hence, his finding that the respondents were available and they were not hiding themselves and payment is not suspended is correctly recorded in their favour.

4. No doubt, at Exh.104, there is a composition deed . It is a mere draft. So far as issue no.5 is concerned, unless the composition is made out, it cannot be held in favour of the appellants. Now a draft of a composition deed is not the same thing as a composition deed itself. In a given situation, there could have been an attempt to tie over the immediate difficulties and therefore, some attempts might have been made, but that alone is not sufficient to establish the fact of composition deed which would necessarily mean that the entire financial affairs of the respondent is not comprehensively dealt with by way of composition deed. It would be in ratio or in percentage. If 1:1 is adopted, that can hardly be said to be a composition deed except for getting accommodation of payment of the amount by way of instalment or on a given agreed date in future. Thus, it would be an arrangement between the parties. But composition necessarily means that an amount is agreed upon against the debt. That is how, the affairs of a given person/firm facing financial constraints at a point of time, can be taken care of. In the instant case, no such situation is to be found and hence, this issue is also rightly decided in favour of the opponents. The judgment therefore cannot be assailed and the appeal fails and is dismissed with no order as to costs.

2. The Receiver having taken over the estate of the respondents and administered also, instead of passing an order of discharge straightaway, so far as the Receiver is concerned, the respondents are directed to approach the trial Court where the Receiver shall also appear and appropriate orders as to his being relieved of his charge will be passed and if the respondents so desire, they shall be permitted to step into the shoes of the Receiver and take over whatever suits and other proceedings that have been filed and pursue the same for being disposed of in accordance with law. The Record and Proceedings are ordered to be sent to the trial Court forthwith.

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